

## **Potential Costs of the Proposed Critical Habitat Designation for the Northwest Atlantic Distinct Population Segment of the Loggerhead Turtle**

### **Introduction**

The Northwest Atlantic Distinct Population Segment (“DPS”) of the loggerhead turtle is currently listed as a “threatened” species under the Endangered Species Act (“ESA”), though critical habitat was not designated at the time of its listing in 1978. On July 18, 2013, the U.S. Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service (“NMFS”) (collectively, “the Services”) proposed to designate “critical habitat” for the loggerhead turtle through two rules – a FWS rule focused on nesting beaches and a NMFS rule focused on marine habitats. The NMFS proposal was the focus of API’s advocacy.

As the American Petroleum Institute (“API”) and the National Offshore Industries Association (“NOIA”) explained in their September 16, 2013 comments, the proposed marine designation (particularly the proposed sargassum habitat designation) failed to meet the ESA’s requirement that NMFS only designate habitat that is prudent and determinable.

Unlike listing determinations, critical habitat designations require NMFS to consider economic factors and allow the Service to exclude areas from a critical habitat designation if the benefits of exclusion outweigh the benefits of inclusion. The Service’s proposed designation contained the required discussion of economic factors, but essentially concluded that the rule would only impose modest additional paperwork costs. The Service reasoned that the only meaningful conservation benefit of designating critical habitat would come from triggering ESA Section 7 consultation for federal actions under the ESA, but that, for the loggerheads, Section 7 was already being triggered because the turtles were potentially present in all the areas where NMFS was proposing to designate critical habitat.

In API’s comments, it pointed out that the Service’s argument against the cost of the proposed designation is also an argument against the benefit of the proposed designation. If the designation would result in no new consultations or conservation measures, and if the only costs for the designation were modest paperwork costs, then why designate critical habitat at all? That question remains relevant and largely unanswered.

As it were, while we concur that the proposed designation is unlikely to impart any conservation benefits, we believe that NMFS is significantly underestimating the paperwork costs, as well as indirect costs such as increased delay and litigation, as well as the potential for operational constraints or decreased access. The following subsections lay out some of the ways NMFS underestimated costs.

### **More Consultations**

The proposed critical habitat designation, and the draft economic analysis (“DEA”)<sup>1</sup> that underlies it, suggest that a final critical habitat designation would result in no costs to industry and only exceptionally modest costs to the government. This is because they argue that consultation requirements under Section 7 of the ESA, which require federal government agencies to ensure their actions do not threaten listed species, are already being triggered by virtue of the potential for turtles to be present in the areas to be designated. Indeed, for all offshore oil and gas operations, the DEA predicts costs of \$17,000 over the next 10 years, all of which they attribute to the potential for modest additional paperwork.<sup>2</sup>

This value is unrealistic for a number of reasons: (1) It accounts only for consultation costs in areas where there are existing offshore oil and gas operations, and not the South- and Mid-Atlantic planning areas where additional oil and gas leasing is being considered and renewable energy projects are already occurring;<sup>3</sup> and, (2) For the entire Western and Central Gulf of Mexico Planning areas, the DEA estimates that there will be only three programmatic consultations in the next ten years,<sup>4</sup> despite the fact that there have been six consultations in this same area in the last five years;<sup>5</sup> and (3) There are no costs attributed to informal consultation, which, although an informal process, can be protracted and expensive.

This estimate, however, also ignores that the consultation analysis required under Section 7 for federal actions that may impact critical habitat is different from the analysis required for federal actions that may impact listed species. That different analysis, and the different standard applied under that analysis, will likely lead to significantly more consultations. This estimate also ignores that NMFS and FWS are presently promulgating a rule to amplify the distinction between those analyses such that Section 7 consultations (both informal and formal) based on critical habitat alone are likely to increase.<sup>6</sup>

Under Section 7, federal agencies must:

insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical . . . .<sup>7</sup>

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<sup>1</sup> Economic Analysis of Critical Habitat Designation of Marine Habitat for the Northwest Atlantic Ocean Distinct Population Segment of the Loggerhead Sea Turtle; Draft Report (July 11, 2013).

<sup>2</sup> DEA at 5-19. Across all industries, the DEA estimates the proposed CH designation would result in a total cost of \$750,000 over the next ten years (\$86,000 annualized) DEA at ES-2.

<sup>3</sup> *Id.* at 5-2.

<sup>4</sup> *Id.* at 5-19.

<sup>5</sup> *Id.* at 5-17.

<sup>6</sup> 79 Fed. Reg. 27060 (May 12, 2013).

<sup>7</sup> 16 U.S.C. § 1536(a)(2).

Previously, the Services' regulations treated the "destruction or adverse modification" standard somewhat analogously to the "jeopardy" standard by requiring consultation/basing Biological Opinions on the "destruction or adverse modification" of critical habitat only when it could "appreciably diminish" "both the survival and recovery of a listed species."<sup>8</sup> After two different appellate courts invalidated the Service's interpretation of the "destruction or adverse modification" standard for impermissibly requiring that the modification appreciably diminish the value of the habitat for survival,<sup>9</sup> the Services issued guidance to discontinue use of the regulatory definitions.<sup>10</sup>

According to the Service's present interpretation of Section 7, an "adverse modification" will trigger consultation even if it does not impact a listed species' survival. All that need be shown to trigger consultation based on critical habitat is that its adverse modification appreciably diminishes the likelihood a species will recover. As such, Section 7 is currently interpreted by the Services to include two distinct triggers for consultation: (1) a jeopardy standard under which consultation is triggered when the action is likely to threaten the species' existence, and (2) a critical habitat standard under which consultation is required when the federal action is merely likely to impede a species' further recovery – without ever threatening its survival.

While NMFS already holds its habitat-based consultation requirements to a much lower bar, it should not be overlooked that the Services are presently promulgating a rule to distinguish the "jeopardy" and "adverse modification" triggers even further. The proposed rule would change the regulatory definition of the term "destruction or adverse modification" to include any modification where the quality, significance, or magnitude of diminishment of the conservation value of the habitat is recognizable.<sup>11</sup> Quite clearly, minimal but noticeable changes in the critical habitat would likely not be enough to invoke the "jeopardy" trigger, but could be construed to fall under the revised "adverse modification" consultation trigger.

For example, NMFS recognizes ship strikes to be a threat to loggerhead turtles. It is conceivable that an action agency would construe a federal action that could lead to a "recognizable" increase in vessel traffic as an "adverse modification," whereas it would not consider such an increase as jeopardizing the existence of the loggerhead.

Designating critical habitat for loggerheads could therefore greatly increase the number of Section 7 consultations in the area NMFS proposes to designate as critical habitat, which, if the sargassum habitat is included, would constitute the largest designation in the history of the ESA. Indeed, the distinction between the "adverse modification" and "jeopardy" triggers is particularly pronounced in the case of loggerheads.

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<sup>8</sup> 50 C.F.R. § 402.02.

<sup>9</sup> *Sierra Club v. U.S. Fish & Wildlife Service*, 245 F.3d 434 (5<sup>th</sup> Cir. 2001); *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9<sup>th</sup> Cir. 2004).

<sup>10</sup> NMFS Assistant Administrator William T. Hogarth Memorandum to Regional Administrators. "Application of the 'Destruction or Adverse Modification' Standard Under Section 7(a)(2) of the Endangered Species Act 2005."

<sup>11</sup> 79 Fed. Reg. at 27,063.

As API explained in comments, loggerheads in the North Atlantic DPS are no longer at risk of extinction. They have been meaningfully protected through a wide variety of overlapping multi-jurisdictional, multi-industry restrictions, prohibitions, and conservation measures that have led to historic levels of loggerhead nesting and abundance. As such, and has been evinced in multiple consultations in the range of the DPS, few federal actions are likely to jeopardize the existence of loggerheads. If critical habitat were designated and the “adverse modification” standard were applied, however, far more consultation could be required for all types of actions that may not threaten loggerhead survival, but could be construed to diminish their recovery.

Not only could there be a significant increase in the number of new federal actions potentially requiring Section 7 consultation based on the designation of critical habitat, but the presence of critical habitat could also significantly increase the number of existing actions for which action agencies may seek reinitiation of consultation.

Listing agency regulations suggest that reinitiation of Section 7 consultation may be required when “discretionary Federal involvement or control over the action has been retained or is authorized by law,” and one of four conditions is met. The conditions related to critical habitat include consideration of whether: (1) new information reveals that critical habitat may be affected in a manner or to an extent not anticipated during the initial consultation; (2) the identified action is modified in a way to affect critical habitat in an unanticipated manner or extent; or, (3) new critical habitat is identified.<sup>12</sup> Because the offshore oil and gas industry operates under permits with significant ongoing oversight and visibility, groups will surely push to require reinitiation of consultation for a wide range of federal actions authorizing activities in the offshore oil and gas industry. For their part, the “action agencies,” on whom ESA’s Section 7 consultation requirement is placed (here, mainly the Bureau of Ocean Energy Management (“BOEM”) and the Bureau of Safety and Environmental Enforcement (“BSEE”)), may seek to be overly inclusive as to the previous actions for which they will seek reinitiation of consultation.

In the oil and gas industry, the universe of “federal actions” under which the action agencies may seek reinitiation of consultation could be significant. Not only would there be reinitiation risks associated with “federal actions” by BOEM and BSEE, but also a wide variety of “federal actions” permitting exploration and production activities in state waters.

### **Consultations Will Cost More**

Even accepting, *arguendo*, the implausible notion that designating critical habitat the size of Texas, California, and North Dakota combined will lead to no additional consultations, it is certain that the costs of consultations will increase. As explained above, Section 7 requires two distinct analyses depending on whether the action is likely to jeopardize existence or adversely modify habitat. Even under the implausible “no new consultation” construct, designating critical habitat would create new costs by increasing the analytical requirements for each consultation.

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<sup>12</sup> 50 C.F.R. § 402.16.

The DEA estimates that the incremental administrative cost the government would incur in each of the consultations to address adverse modification would be \$4,200.<sup>13</sup>

This estimate is simply unrealistic. As discussed above, the “adverse modification” analysis of impacts to recovery is far different, and far more nuanced, than an analysis of whether an action would jeopardize a species’ existence. Because the Northwest Atlantic DPS is in an advanced stage of recovery (arguably, fully recovered), there are few conceivable federal actions requiring a searching analysis to conclude that its existence would not be jeopardized. An evaluation of the impact of an adverse modification on the loggerhead’s continued recovery, on the other hand, could potentially require a more costly and time-consuming analysis.

Following the guidance to discontinue use of the regulatory definitions, the Services evaluated “destruction or adverse modification” by determining whether the Federal action and its effects would result in the critical habitat remaining functional to serve the intended conservation role of the species. This analysis simply focused on the ability of the critical habitat to serve its purpose.

Under the proposed “adverse modification” rule, consultations would be required for any “direct or indirect alteration that appreciably diminishes the conservation value of critical habitat.”<sup>14</sup> Such alterations could include those that affect the quantity or quality of physical and biological features of the critical habitat and those that would preclude or significantly delay the development of those features in a degraded area. Additional consideration for alterations could be those that delay recovery, make it more difficult, or make it less likely. The Services emphasize that this new analysis focuses upon the physical and biological features of the critical habitat; therefore, an in-depth examination of biological and physical conditions before and after the proposed Federal action could be needed to establish the diminishment of the conservation value.

The “destruction or adverse modification” test is differentiated from the analysis the proposed rule suggests for determining whether an action jeopardizes a species’ existence. This different test could entail an examination of the species’ reproduction, numbers, and distribution, an evaluation wholly different from the physical and biological analyses of the critical habitat mentioned above. It is clear that the testing required to determine an “adverse modification” under a critical habitat designation is distinct from that to determine whether a species is jeopardized, and that the critical habitat analysis may become even more complex should the proposed rule come into force.

### **Consultations Have Economic Impacts on Private Industry As Well**

As noted above, NMFS presumes the proposed critical habitat designation will impose no costs to industry associated with increases in the number of, and analytical requirements for, Section 7 consultations. While the Associations agree that consultations pursuant to the programmatic

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<sup>13</sup> *Id.* at 5-17.

<sup>14</sup> 79 Fed. Reg. at 27,061.

Environmental Impact Statement (“EIS”) result in greater costs to the consulting agency, such consultations still result in costs to the industries that operate under the programmatic EIS.

The primary source of this underestimation derives from the failure to consider the near-certain indirect costs of the designation, such as project delay and litigation. While the DEA recognizes the potential for these impacts, it found them to be too speculative to quantify.<sup>15</sup> Litigation, and litigation-caused project delays, however, are not speculative. This critical habitat designation was proposed in response to litigation from three separate environmental groups.<sup>16</sup> There have been at least eight other lawsuits filed related to the loggerhead alone.<sup>17</sup> Additionally, the oil and gas industry, and particularly those operations that occur offshore in the Gulf of Mexico and elsewhere, have always been major targets for litigation. In fact, environmental groups have brought legal actions on nearly all federal actions authorizing offshore oil and gas activity. That environmental groups will attempt to use a final critical habitat designation as a basis for further litigation and as a means of constraining and delaying offshore development is not speculative – it is a near-certainty even if the critical habitat designation provides no additional conservation benefits to loggerheads.

Even assuming that litigation may be filed on only the three programmatic consultations that the DEA anticipates for the oil and gas industry, there will be an incremental cost to respond to additional claims relative to allegations of adverse modifications. In comments on the proposed polar bear critical habitat designation, the oil and gas industry estimated the incremental cost of defending an additional claim related to adverse modification to be around \$50,000.<sup>18</sup> That value may be higher or lower now, four years later and in the lower 48 states, but it most certainly is not zero. If similar incremental litigation costs were carried over across all the industries and industry activities in the DEA, the costs of this proposed critical habitat designation would increase exponentially—and likely accompanying those litigation costs would be the substantial costs related to project delays and production slippage.

As discussed above, the “adverse modification” analysis will likely be far more extensive for loggerheads than the “jeopardy” analysis. In every Section 7 consultation, the Service must provide an analysis that the proposed action will not adversely destroy or modify critical habitat. To support that conclusion, in every instance, NMFS will have to identify which Primary Constituent Elements are present at each site and demonstrate that the proposed action will not significantly impair those elements. Development of that record—imminently supportable as it

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<sup>15</sup> *Id.* at ES-7–8.

<sup>16</sup> Center for Biological Diversity, Oceana, and the Turtle Island Restoration Network. 78 Fed. Reg. at 43007.

<sup>17</sup> *Oceana, Inc. v. Blank*, Civil Action No. 08-1881 (PLF) (D.D.C.) (pending); *Defenders of Wildlife v. Bureau of Ocean Energy Mgmt. and Enforcement*, 791 F. Supp. 2d 1158 (S.D. Ala. 2011); *Oceana v. Gutierrez*, D.D.C. Civ. No. 07-142 (RBW) (2007); *The Ocean Conservancy v. Gutierrez*, 394 F. Supp. 2d 147 (D.D.C. 2005); *Oceana v. Evans*, Civ. No. 03-10570-GAO, 2004 U.S. Dist. LEXIS 14895 (D. Mass. July 30, 2004); *Oceana v. Evans*, 384 F. Supp. 2d 203 (D.D.C. 2005); *Loggerhead Turtle v. Council of Volusia Cty., Fla.*, 120 F. Supp. 2d 1005 (11th Cir. 2000); *Center for Marine Conservation v. Brown*, 917 F. Supp. 1128 (S.D. Texas 1996).

<sup>18</sup> See July 6, 2010 Comments from Alaska Oil and Gas Association and American Petroleum Institute in FWS-R7-ES-2009-0042.

may be—takes time and relies on increasingly overburdened agency resources. Far from being speculative, delay is a likely outcome of such additional analysis.

## **Conclusion**

Although the proposed critical habitat designation and the DEA that underlies it suggest that the resultant costs to the government would be minimal and the costs to the industry nonexistent, it is clear that this is not the case. Federal consultations are likely to increase, and will be more complex and costly should the proposed rule differentiating the two standards come into effect. Private industry will also suffer additional costs through project delays and litigation, which are sure to follow any critical habitat designation. Even if these additional costs are considered modest or uncertain, they must be viewed in the context of the potential benefits of the proposed designation – benefits which NMFS acknowledges largely do not exist.